IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-727

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA), *Petitioner*

v.

CLARE IMMACULATA KENNY, *Respondent*

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Lewis H. Van Dusen, Jr., Esq.
DRINKER, BIDDLE AND REATH
1100 PNB Building
Philadelphia, Pa. 19107
(215) 491-7216

Lewis Kates, Esq.
KATES & LIVESEY
2900 PSFS Building
12 S. 12th Street
Philadelphia, Pa. 19107
(215) WA 3-8080
Attorneys for Petitioner

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

TABLE OF CONTENTS

Page

AUTHORITIES RELIED UPON

Page

Statutes

Miscellaneous

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY (SEPTA), *Petitioner*

v.

CLARE IMMACULATA KENNY, *Respondent*

PETITION FOR CERTIORARI TO THE
COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The unreported opinion and order of the United States District Court for the Eastern District of Pennsylvania (Weiner, J.) filed September 26, 1977 granting judgment N.O.V. for defendant-petitioner is set forth in full and appended hereto as Exhibit "A". The unreported opinion and order of the Court of Appeals for the Third Circuit reversing judgment N.O.V. filed on July 18, 1978 is set forth in full and appended hereto as Exhibit "B". The Order of the Court of Appeals for the Third Circuit filed August 15, 1978 denying defendant-petitioner's Motion for Rehearing is appended hereto as Exhibit "C".

STATEMENT OF JURISDICTION

This petition seeks review of the judgment and order of the United States Court of Appeals for the Third Circuit originally filed on July 18, 1978 and later issued in lieu of a formal mandate on August 15, 1978 as an Amended Judgment upon denial of Petitioners' Motion for Rehearing. Jurisdiction is conferred by 28 U.S.C. Sec. 1254(1), and is proper under Rule 19(1)(b) of the rules of this Court. This Petition is timely filed within ninety days of the filing of the Amended Judgment entered below as required by 28 U.S.C., Sec. 21026c.

QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Third Circuit erred in holding that under Pennsylvania law a public transportation authority may be held liable for the rape of a passenger where that crime could not reasonably have been anticipated.

II. Whether a Federal Court of Appeals, in attempting to ascertain Pennsylvania law governing a diversity case which it has under review, may ignore decisions of Pennsylvania's Appellate Courts which control the legal question involved?

STATEMENT OF THE CASE

The Petitioner Southeastern Pennsylvania Transportation Authority (SEPTA) is an agency and instrumentality of the Commonwealth of Pennsylvania charged with the operation of a public transit system in and around the City of Philadelphia. Respondent, Clare Immaculata Kenny brought the instant action against SEPTA and the City of Philadelphia after she was assaulted and raped at a SEPTA elevated railroad station in the Frankford section of Philadelphia while waiting for a train.

When Kenny first arrived at the station on October 2, 1973, she paid her fare on the ground level cashier's booth and then went upstairs to take a seat on the then deserted elevated northbound platform. A few minutes later, the man who turned out to be the rapist arrived on the southbound platform. He walked across the bridge to the northbound platform, sat beside Kenny and immediately assaulted and dragged her to the south end of the platform. A train approached and the assailant then ran from the platform down the stairs. Kenny uttered no call for help. The train arrived at the station but before Kenny got to her feet, the assailant returned and pulled her against the wall and began kissing her and raped her. He was arrested before he could leave the platform, police seemingly having been notified by a passerby on the street who heard the commotion. No more than twenty minutes elapsed between the time Kenny arrived at the station (9:00 p.m.), and the time her assailant was apprehended (9:20 p.m.). The assault and rape took no more than a minute or two.

Kenny, a New Jersey resident, filed suit against SEPTA and the City of Philadelphia in the United States District Court for the Eastern District of Pennsylvania alleging that the defendant's negligence had resulted in the rape. The evidence produced at trial established that the sole SEPTA employee on duty at the time of the incident was its ground floor cashier. He testified that he had seen both Kenny and the rapist go up to the platform, but the rapist was well dressed and of good appearance, and the cashier had not heard any noises or commotion although he had been playing a radio in his cashier booth at the time. The undisputed evidence at trial was that there had been no prior incidents of criminal or improper activity of any kind at the station. The Philadelphia Police Department handled security for the SEPTA system and periodically checked the Frankford station. An officer testified that he had inspected the station earlier on the day of the rape.

At trial, the respondent attempted to show that the lighting system on the extreme South end of the platform was inadequate in that certain incandescent bulbs were either broken or missing at the time of the rape, even though Kenny herself had testified that the lighting was sufficient to enable her to read a book while waiting for her train. SEPTA produced its records and the testimony of one of its maintenance men which proved that the lighting was checked on a daily basis.

The jury returned its verdict in favor of Kenny and against SEPTA in the amount of $18,000.00. An additional defendant The City of Philadelphia was exonerated. The District Court below granted SEPTA's Motion for Judgment N.O.V. citing such Pennsylvania cases as *Kerns v. Pennsylvania R.R.Co.*, 366 Pa. 477, 77 A.2d 381 (1951) and *Romisher v. SEPTA*, 65 Pa. D&C 2d 483, 493 (1974). The District Court held that under Pennsylvania law, SEPTA, as a common carrier, was not liable for the unpredictable tortious acts of third parties:

> "We believe that it is only where there are reasonable grounds to anticipate that the offending party indicated a disposition to engage in violent behavior or to locations where passengers regularly and predictably are prone to engage in unruly and criminal conduct that a common carrier may be found to be negligent in failing to provide adequate security against sudden attacks by a third party." *Kenny vs. SEPTA*, No. 76-2580 (E.D.Pa. Sept. 26, 1977), p. 5.

The District Court also held that any lack of lighting or warning devices at the station was not a proximate cause of the attack. *Id.* at 6.

On Appeal, a three judge panel of the Court of Appeals for the Third Circuit, reversed and reinstated the verdict for the respondent. The Court of Appeals disagreed with the District Court insofar as the lower court had ruled that SEPTA's liability depended upon whether the attack

by the particular assailant at the particular station could have been anticipated. The Court of Appeals asserted that crime was "on the rise" on the SEPTA system and held that SEPTA's liability depended more broadly upon whether it "could reasonably have expected criminal activity from anyone at its station." *Kenny vs. SEPTA*, (3d Cir. July 18, 1978), p. 26. Relying on the Restatement (second) of Torts Sec. 344, Comment "e" and three recent decisions of the Pennsylvania Supreme Court which did not involve public carriers, the Third Circuit held that the jury could have found that inadequate lighting and the placement of the cashier's booth made the station susceptible to criminal activity which SEPTA could have anticipated and for which it could be held liable. SEPTA's cross appeal seeking a new trial as an alternative to reversal was dismissed.

SEPTA then petitioned for a rehearing before the Court of Appeals en banc asserting, inter alia, that the panel had not correctly applied the relevant and controlling Pennsylvania law. This Motion for rehearing was denied, and SEPTA now petitions this Honorable Court for a Writ of Certiorari and asserts in support of this Petition that the Court of Appeals below has decided an important State question in conflict with applicable state law.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That a Public Transportation Authority May Be Held Liable for the Tortious Acts of Third Persons Whose Acts Could Not Reasonably Have Been Anticipated Conflicts With Controlling Pennsylvania Law.

While the opinion of the Third Circuit purported to rule according to Pennsylvania law, the issue of SEPTA's liability was not decided in accordance with the decisions of the highest court in Pennsylvania as required by this Court's landmark decision in *Erie R.R. v. Thompkins*, 304

U.S. 64 (1938). This Court's elaborations upon the *Erie* doctrine have directed Federal Courts in diversity matters not to deviate from decisions of the forum state's highest court and its intermediate appellate court, where there is no higher authority, in deciding questions of state law. *See, e.g. Fidelity Union Trust Co. v. Field,* 311 U.S. 169 (1940); *West v. AT & T Co.,* 311 U.S. 223 (1940). Yet the Court of Appeals below ignored decisions of Pennsylvania Appellate Courts which were practically on "all fours" with the facts and issues presented in the instant case.

The central question of whether SEPTA could be liable for an unpredictable assault on one of its passengers by a third party was clearly answered by the highest court of Pennsylvania in *Kerns v. Pennsylvania R. Co.,* 366 Pa. 477, 77 A.2d 381 (1951). In *Kerns* the plaintiff was injured at the defendant's principal railroad station by a drunk who pushed him down a flight of stairs. Although the drunk had been singing inside the station in the presence of railroad employees for several minutes, he had not shown any violent propensity until he pushed the plaintiff. On these facts the Supreme Court of Pennsylvania ruled that the trial court had erred in submitting the question of the carrier's negligence to the jury, since the drunk had given no indication of a violent disposition.

> "The carrier is liable for injuries to a passenger resulting from negligent or unlawful acts of a fellow passenger if prior to the accident the conduct of the offending party has been such as to indicate a disposition to indulge in physically violent conduct and give rise to a reasonable apprehension of injury to other parties." *Id* at 479, 77 A.2d at 382 quoting *Burlick v. Balt. & Ohio R.R. Co.,* 41 Pa. Superior Ct. 87, 91 (1909).

This decision in *Kerns* was consistent with a long line of Pennsylvania Supreme Court holdings that carriers, although under a high duty of care toward their passengers

may not be liable for attacks on those passengers by third parties unless those attacks could have been reasonably anticipated. *See e.g. Wood v. Philadelphia Rapid Transit Co.,* 260 Pa. 481 (1918) (no liability where passenger struck by pipe carried by another passenger); *Widener v. Philadelphia Rapid Transit,* 224 Pa. 243 (1910) (passenger injured when shoved on board train by another passenger). The opinion of the Court below notwithstanding, the question of the carrier's liability depends on whether the *particular* offender's attack could have been anticipated and prevented. In *Hillebrecht v. Pittsburgh R. Co.,* 55 Pa. Superior Ct. 204 (1903), the conductor was aware of the verbal threat of violence against the plaintiff by a passenger. However, the plaintiff was not permitted to recover for his injuries caused when that threat was made good "suddenly and without warning" by another passenger.

More recent opinions of the Superior Court of Pennsylvania, a court of last resort with state wide jurisdiction,[1] favorably cited and quoted the *Kerns* decision. *See Mangini v. SEPTA,* 235 Pa. Superior Ct. 478, 482, 344 A.2d 621, 623 (1975).

The Superior Court in *Pollock v. SEPTA,* 228 Pa. Superior Ct. 911, 322 A.2d 672, *affg.* 61 Pa. D&C 2d 711 (1972), affirmed the ruling of the trial court that SEPTA "was not responsible for unforeseeable and unpreventable criminal acts of third persons" where the plaintiff had been attacked and thrown on the tracks at a subway station by a roving band of robbers.

---

1. The Pennsylvania Appellate Court Jurisdiction Act of 1970 provides that "The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of Common Pleas . . . except . . . appeals . . . within the exclusive jurisdiction of the Supreme Court or Commonwealth Court." 17 P.S. §211.302. Appeal from the Superior Court to the Supreme Court is not a matter of right but is allowed only on petition to the Supreme Court. 17 P.S. 211.204.

Kerns was followed by a Pennsylvania trial court in ruling on facts similar to the case at bar in *Romisher v. SEPTA*, 65 Pa. D&C 483 (1974) (en banc). In *Romisher*, a minor passenger was injured in a scuffle with one or more other students on a SEPTA subway platform. Evidence was offered by the plaintiff to establish that such scuffles had taken place before, but the Court noted that it was totally unpredictable when such an incident might occur. In response to plaintiff's contention that SEPTA was obliged to provide its own guards for protection against criminal conduct, the Court stated, "our courts have never declared that such a responsibility is imposed upon public passenger carriers". *Id.* at 488.

However, that is precisely the responsibility which the Court of Appeals below would by its opinion now impose. The Court below ignored *Kerns*, *Pollock*, *Romisher* and a host of other Pennsylvania cases, and instead relied principally on the Restatement (second) of Torts (1965) for its holding that SEPTA may be liable for failing to guard and totally light one of its stations. The Third Circuit cited section 344 which provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the passenger to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

While it is true that this section has been cited by the Pennsylvania Supreme Court to define the duty of property owners to protect invitees on their land in cases such as *Moran v. Valley Forge Drive-In Theater, Inc.*, 431 Pa. 432, 246 A2d 875 (1968); and *Anderson v. Bushong Pontiac Co.*, 404 Pa. 382, 171 A.2d 771 (1961) (also cited by the Court below), it is clear that the Pennsylvania Supreme Court would find SEPTA had met its obligations under this section in the instant case. *See Kearns, supra; Pollock, supra; Romisher, supra.*

The Court of Appeals parts company with the District Court and Pennsylvania law when it holds that even if SEPTA had no reason to expect an attack from the particular rapist involved, the jury could have found that SEPTA was liable by reason of its failure to take additional steps to guard generally against such attacks. This was clearly error since Pennsylvania decisions have held carriers liable to protect against third party attacks generally *only* in those situations where the carrier has notice of such prior assaults at the particular station involved. *See Mangini v. SEPTA*, 235 Pa. Superior Ct. at 482, 344 A.2d at 621.

In all of the Pennsylvania cases cited by the Court below where a duty to provide affirmative protection against the general possibility of criminal attacks was found, there had been a history of such activity on the defendant's premises. The Court below does not attempt to contradict the District Court's findings and the weight of evidence that there had been no such history of crime at the station involved, but simply asserts without proof sua sponte that "crime is on the rise" in the SEPTA system. Does this mean that SEPTA must provide guards at its 252 railway stations? Can these cases possibly mean that SEPTA acquired liability for general unexpected attacks at a heretofore crime-free station simply because a few lightbulbs were missing (even though there was enough light to enable plaintiff to read her paper book) or because the cashier had his radio playing?

Simply because the Pennsylvania Supreme Court may have imposed a duty on the defendant in *Moran, supra*, to have provided an effective guard at its one movie theater

with a history of trouble, it does not at all follow that the instant defendant must provide guards throughout its vast system even if "crime were on the rise". There are 310 miles of track, 7000 surface stops and 3000 miles of route traffic in the SEPTA system alone. Over 1,200,000 passengers ride the system daily.

In 1972, the Mayor of the City of Philadelphia together with other public officials issued a public statement that the City would embark on a program to curb crime on the SEPTA system. The charter which created SEPTA does not authorize it to maintain its own police force, so in 1973 the City, receiving a one million dollar federal grant, hired 60 additional policemen to provide protection on the SFPTA system. At the time of the incident in question, the general frequency of all crime on the SEPTA system was less than that occurring on the streets of areas which the system served.

It is therefore more than logical that decisions such as *Kerns* limiting SEPTA's liability to attacks by particular individuals or in particular locations where they could have been anticipated retain their vitality. It is not inconsistent for Pennsylvania Courts to require movie theaters and shopping centers to provide guards for their patrons, but hold that to be an unreasonable burden for large public carriers.

Indeed, Pennsylvania is not alone on this legal issue. None of the states have held that large public transportation systems and other carriers must provide guards against the general danger that third parties may attack their passengers.[2]

2. Orr v. New Orleans Public Service, Inc. 349 So.2d 417 (La. App. 1977); Jackson v. B.State Transit System, 550 S.W. 2d 228 (Mo. App. 1977); Hanback v. Seaboard Coastline R.R., 396 F.Supp. 80 (D.S.C. 1975); City of Dallas v. Jackson, 450 S.W.2d 62 (Tex. 1970); Letsos v. Chicago Transit Authority, 47 Ill.2d 437, 265 N.E. 2d 650 (1970); Continental Southern Lines, Inc. v. Goodsell, 247 Ark 606, 446 S.W.2d 688 (1969); Martin v. Erie-Lackawanna R.Co. 388 F.2d 802 (6th CR. 1968) (Ohio law); Lipshultz v. Fifth Ave. Coach Lines, Inc. 28 A.D.2d 266 284 N.Y. S.2d 470 (1967); LoPresti v. Metropolitan Transit Authority, 187 N.E.2d 847 (Mass. 1963); Zimmet v. City of New York, 158 N.Y.S.2d 356 (1956); Hicks v. Scott, 48 Cal. App.2d 481, 120 P.2d 107 (1948).

The precedential force of the Court of Appeals decision below could place the ruinous financial burden of providing security as well as a ruinous potential liability on all of these systems. Although the Third Circuit purported to decide only a Pennsylvania diversity case, it would not overstate the danger to say that the financial resources of mass transit systems throughout the nation will be imperiled unless this Court reverses the decision below.

II. A Federal Court of Appeals In Attempting to Ascertain State Law Governing a Diversity Case Under Review, May Not Ignore Controlling Decisions of the State's Appellate Courts Treating Identical Legal Issues and Facts.

The instant petition presents this Court with an opportunity to amplify the *Erie* doctrine and elaborate upon the proper authorities for a federal court to rely upon when determining the governing state law in diversity cases. A reversal here would curb the Federal Judiciary from creating a body of applied state substantive law which in fact differs from that state's law and which invites litigants to resort to the federal system, perhaps successfully, simply because they know that state courts in prior cases have been adverse on the same issue.

In the instant case, the Court of Appeals was faced on one hand with an established line of Pennsylvania cases holding that a carrier may not be held liable for unanticipated attacks by particular third parties, and on the other by recent decisions requiring owners of particular trouble-

prone premises to provide guards against the general danger of attacks. As the foregoing analysis of Pennsylvania law illustrates, the Court below should have followed the former authorities.

An analysis of the guidance provided in this Court's opinions should also have led the Court of Appeals to affirm the District Court. This Court has repeatedly held that in a diversity case, the Federal Court is sitting as a state court and as such must look to the state Supreme Court since "the state's highest court is the best authority on its law". *C.I.R. v. Estate of Bosch*, 387 U.S. 463, 465 (1967). It was therefore plainly error for the Court of Appeals to seek authority in the comments to the Restatement while the matter at hand had already been ruled upon in *Kerns v. Pennsylvania R.Co., supra.*

The fact that *Kerns* was decided in 1951 should not have diminished its persuasiveness to the Court of Appeals in the instant case. In *Bernhardt v. Polygraphic Co.*, 350 U.S. 178 (1955), decisions of the Supreme Court of Vermont dating back to 1910 were deemed controlling on Vermont law where "no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and no legislative movement is under way to change the result of those cases". *Id.* at 204. In *Gooding v. Wilson*, 405 U.S. 518 (1972), a Georgia Supreme Court interpretation of a statute contained in a decision 50 years old was treated as controlling where that decision had been cited favorably in recent cases. The fact that *Kerns* has been followed and quoted in recent cases such as *Mangini v. SEPTA, supra;* and *Romisher v. SEPTA, supra,* is therefore additional evidence of its force and current vitality.

The Court of Appeals should also have looked to the Pennsylvania Superior Court's affirmance in *Pollock, supra* to guide its decision. No more closer set of facts to the instant case could have been imagined, and the fact that *Pollock* was not a Supreme Court case does not weaken its authority as a rule of state law.

> "An intermediate appellate state court . . . is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court would decide otherwise". *C.I.R. v. Estate of Bosch*, 387 U.S. at 465, quoting *West v. American Tel. & Tel. Co.*, 311 U.S. at 237.

With the clear support for the *Pollock* decision apparent in *Kerns* and its predecessors, it was error for the Court below to so cavalierly disregard recent authority from Pennsylvania's lower courts. *See Fidelity Union Trust Co. v. Field, supra; Six Companies v. Joint Highway Dist.*, 311 U.S. 169 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

Here the Court below was faced with the basic question present in all negligence cases, to wit, does the scope of defendant's duty include the plaintiff's damages? In answering these hard questions, courts must look to the nature of the defendant involved in deciding what risks it would be reasonable to charge that defendant to prevent. Since the Pennsylvania Supreme Court could easily find that it is reasonable to impose a greater duty upon a movie theater with a known history of violent incidents to protect its discreet quantity of patrons from third parties than might be imposed on a sprawling mass transit system, the Court below should have relied on the Pennsylvania carrier cases rather than the movie theater cases in defining SEPTA's duty.

However, the Court of Appeals below chose to ignore the carrier cases where the Pennsylvania Courts directly spoke to the issues *subjudice*, and instead purported to discern from cases arising from entirely different facts the "trend" of Pennsylvania law. If federal courts are permitted to disregard state decisions with which they do not agree which directly control the issue before them and instead interpolate state law as they prefer it to be from

decisions not on point, then a separate body of state law will develop in the federal courts. This naturally results in the forum shopping which this Court was trying to curtail by its decision in *Erie R.R. v. Thompkins, supra.* The difference between the problem this Court addressed in *Erie* and the one presented herein is that federal common law is now being derived in the guise of what a federal judge views to be the trend of state law.

Of course, there my be circumstances where an issue has never been decided by the states' appellate courts, and under these circumstances federal courts must discern the trend of state law. *Kerns* and other decisions show that is surely not the situation in the instant case, yet the court below has now adopted a view of a carrier's liability that the Pennsylvania decisions do not permit and have never envisioned. The petitioner now fears that this decision, insulated from the reversal which surely would follow if appeal to the Pennsylvania Appellate Courts were possible, will cause a stampede to the District Courts by plaintiffs injured on the SEPTA lines in muggings, thefts, and other assaults.

Frequent review of diversity cases by this Court is an impractical procedure for all concerned. This Court is presented by this appeal with an opportunity to mitigate that problem. A reversal of the Court of Appeals herein would direct federal courts to resolve the common problem of defining the scope of a defendant's duty in diversity negligence cases in accordance with those state court decisions arising from the most similar set of facts. This approach would have guided the Court below to the correct holding in the instant case, and would limit the occurrence of federal decisions conflicting with state law in future cases.

CONCLUSION

Because of the issues outlined in the foregoing argument, this Court should grant the instant petition for a writ of certiorari to review the judgment of the Court of Appeals below.

Respectfully submitted,

LEWIS H. VAN DUSEN, JR., ESQ.
LEWIS KATES, ESQ.
Attorneys for the Petitioner

EXHIBIT A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 76-2580

CLARE IMMACULATA KENNY

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
AND
CITY OF PHILADELPHIA

OPINION AND ORDER SUR DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY FOR JUDGMENT N.O.V. OR ALTERNATIVELY FOR A NEW TRIAL

Weiner, J. September 26, 1977

A judgment for $18,000 was entered on a jury verdict against defendant Southeastern Pennsylvania Transportation Authority (Septa) and in favor of plaintiff who sustained personal injuries as a result of being raped on an elevated train platform located at 3rd and Spring Garden Streets, Philadelphia, Pennsylvania. The jury exonerated defendant, City of Philadelphia. Presented to the Court is Septa's Motion for Judgment N.O.V. or in the alternative for a New Trial.

It is well established that in ruling upon a Motion for Judgment N.O.V. or a New Trial the Court is bound to review the evidence and all reasonable inferences therefrom in the light most favorable to the verdict winner. *Haldeman v. Bell Telephone Co. of Pa.*, 387 F2d 843 (3rd Cir. 1968); *Woods v. National Life and Accident Insurance Company*, 380 F2d 843 (3rd Cir. 1967). Applying this standard we, in summarization form, accept the following facts as established. On October 2, 1975, at about 9:00 p.m., plaintiff who was 19 years of age, walked to the Septa elevated station, paid her fare at the ground level cashier's booth, proceeded to the elevated platform, sat on a bench and proceeded to write a letter while waiting for her train. There was a man standing on the opposite platform who walked across a bridge to the platform where she was seated and sat down beside her (N.T. 31). He then seized her and dragged her approximately 150 feet into the dark area of the south end of the platform where there was no lighting at all. (N.T. 31, 32—3rd day). Plaintiff was beaten and raped over a period of time of approximately 10 to 20 minutes. In response to a radio call "woman screaming" police officer Kosiucki arrived at the platform and was successful in apprehending the rapist.

Plaintiff was treated at the Philadelphia General Hospital on the evening of the rape. The following week she was treated by her gynecologist, two weeks later by her eye doctor, several sessions with a psychiatrist and subsequently a second psychiatrist. She vividly described her emotional distress, her fear, loss of the companionship and love of her fiance and to this day capsulized her anguish by stating ". . . I felt this strange man hurt me and humiliated me. I just can't trust any man. It hurt me so bad that sometimes I just want to be left alone." (N.T. p. 8 to 17 inclusive—5th day of trial). The testimony further established that there was no safety device or communications system for passengers, that the only telephone located at this location was in the cashier's booth on the street level,

three flights below the elevated platform. Evidence revealed that Septa depended solely upon the police department for passenger security. We shall initially concentrate upon the defendant's motion for

Judgment N.O.V.

In its Motion for a Judgment N.O.V. the defendant contends that under the facts of this case, it cannot be responsible for the criminal acts of a third person. Under Pennsylvania law a common carrier is held to the highest degree of care. *Summers v. Hessler*, 227 Pa. Super. 41, 323 A2d (1974). There is no dispute that Septa is a common carrier. As stated in *Mangini v. Southeastern Pennsylvania Transportation Authority*, 344 A2d Pa. Super., 621-623:

> "In the case where a third person, whether a passenger or otherwise, acts in a violent, criminal or negligent manner, the carrier has a duty to protect the other passengers from his misbehavior to the degree possible. 'It is [the duty of passenger carriers] to repress disorder . . . and in case there is any reasonable ground to apprehend that other passengers may suffer physical injury from the violence of disorderly passengers, it is their duty to use every means at their command to protect other passengers and restrain, and if necessary remove . . . the disorderly parties.' *Gerlach v. Pittsburgh Rys. Co.*, 94 Pa. Super. 121, 129 (1928), quoting *Barlick v. Baltimore & Ohio R.R. Co.*, 41 Pa. Super. 87, 92 (1909). If necessary, the employees of a carrier may enlist the assistance of willing passengers, police, or other authorities to quell a disturbance. See *La Sota v. Philadelphia Transp. Co.*, 421 Pa. 386, 219 A.2d 296 (1966); *Kennedy v. Pennsylvania R.R. Co.*, 32 Pa. Super. 623 (1907). When these measures are not employed and a passenger is injured, the carrier is liable if prior to the injury the conduct of the offending parties indicated a disposi-

tion to engage in violent, harmful behavior, giving rise to a reasonable apprehension of injury to other parties. See *Kerns v. Philadelphia R.R. Co.*, 366 Pa. 477, 77 A.2d 381 (1951)."

The fatal defect in plaintiff's proofs consists of the fact that the evidence failed to establish that the defendant had reason to suspect that the offending party "indicated a disposition to engage in violent, harmful behavior, giving rise to a reasonable apprehension of injury to other parties". *id.* at 623. See also Restatement of Torts 2d, §314A-1(a), Comment E, which in relevant part states:

". . . The defendant is not liable where he neither knows nor should know of the unreasonable risk. He is not required to take precaution against sudden attack from a third person which he has no reason to anticipate."

Trial testimony clearly established that there was no indication that the rapist's appearance gave cause for suspicion, nor was there anything to warn the cashier of his subsequent behavior. It is also undisputed that for at least three years, between 1972 and 1975, the only criminal incident that occurred at this platform was the rape in the instant case. We believe that it is only where there are reasonable grounds to anticipate that the offending party indicated a disposition to engage in violent behavior or to locations where passengers regularly and predictably are prone to engage in unruly and criminal conduct that a common carrier may be found to be negligent in failing to provide adequate security against sudden attacks by a third party. Cf. *Romisher v. Septa.* 65 D. & C. 483, 493 (1974).

There remains for consideration the plaintiff's contention that the negligence of Septa could be predicated upon the failure to have provided adequate lighting and a system of wider security, including but not limited to

television coverage, telephones and warning devices. In *Martin v. Erie-Lackawanna Railroad*, 388 F2d 802, 805 (6th Cir. 1968), a well reasoned compendium of the legal principle applicable to the kind of problem we have here, the Court said:

"Defendant argues that each of the negligent acts or omissions alleged in the complaint is based upon the assumption that defendant know or should have known that plaintiffs were in a perilous position or that an attack upon Mrs. Martin was imminent or likely. While this is of course true, the facts which support the allegations that defendant failed to provide police protection for its passengers, failed to provide adequate lighting on the outside platform, and failed to inform plaintiffs that the train in which they had expressed an interest was expected to be late, are also relevant to the issue of whether defendant knew, or should have known, that Mrs. Martin was likely to be the subject of an attack. Viewing the evidence in support of these three allegations most favorably toward plaintiffs, the jury was entitled to find that defendant knew plaintiffs had gone out upon a dimly lit and unguarded platform to await the arrival of a train which was not expected to arrive for approximately ten minutes. While these facts might suggest a situation such as would not discourage those with criminal propensities from taking advantage of plaintiffs, these circumstances would not, in and of themselves, be sufficient to support a determination that defendant should have known of the likelihood of an attack."

We are of the opinion that the lack of warning devices was not a proximate cause of the assault upon the plaintiff, nor is this allegation sufficient to support a determination that defendant should have known of the likelihood of an attack. Accordingly the Motion for Judgment N.O.V. will be granted.

Motion for a New Trial

In the first allegation of error it is contended that the verdict was excessive. In our previous discussion of the facts we had noted the physical and mental anguish suffered by the plaintiff. As a general proposition courts are reluctant to disturb a jury's verdict on the ground of excessiveness where damages are unliquidated and there is no measure of mathematical certainty. *Kaffana v. Pennsylvania Railroad Company,* 212 F. Supp. 362 (W.D. Pa. 1963). The test for excessiveness of damages is whether the verdict is so excessive as to shock the conscience or that it is the product of the jury's passion or prejudice. *Smith v. Bowater S.S. Co.,* 339 F. Supp. 399 (E.D. Pa. 1972). We are not prepared to state that the verdict of the jury grossly overcompensated the plaintiff for the traumatic experience that was visited upon her. Accepting her testimony, as we must, the humiliation, mental anguish, emotional distress, drastic change in her social attitude and life style prevailed at the time of trial and there is every possibility that it may continue for an unforeseen time. Hence, the conscience of this Court was not shocked nor do we think the jury's verdict was based on passion or prejudice.

The next allegation is that error was committed when the Court permitted evidence of a change or modification in the lighting at the station after the incident. As a general rule, evidence of change in conditions or proof of repairs made after an injury is inadmissible to prove antecedent negligence, but is relevant when introduced for the purpose of attacking the credibility of a witness. *Tyler v. Dowell, Inc.,* 274 F2d 899, (2nd Cir.) *Cert.* Denied, 363 U.S. 812 (1960). A Mr. Morris, employed by Septa testified that lights at the Fairmount station are checked on a daily basis (N.T. 85—3rd day of trial). The questions relating to subsequent repairs were targeted upon the credibility of the above statement. In *George v. Morgan Construction*

Co., 359 F. Supp. 253, (E.D. Pa. 1975), the court decided that although evidence of post accident precautions is not admissible to prove prior negligence, it is admissible to prove whether certain precautions would have been feasible, that is, whether there was a practical method which was neither too costly or burdensome to employ to prevent the accident. Under either standard, the questions regarding post accident measures were properly received in evidence.

Lastly, the defendant contends that the interrogatories submitted to the jury were unfair and prejudicial.[1] Prior to distributing the interrogatories to the jury a sidebar conference was held with counsel. Counsel for defendants voiced their respective objections to the wording contained therein. Believing that the factual testimony coupled with the closing jury addresses and the Court's charge removed any ambiguity concerning the meaning of the phrase "knowledge of a dangerous condition", the Court was satisfied that the language used in the interrogatory was clear and unambiguous. The jury was told that:

> "There is no dispute that the defendant SEPTA is a common carrier and therefore held to the highest degree of care, but this does not mean that SEPTA warranted the absolute safety of the plaintiff. This means that SEPTA was bound to exercise the upmost degree of diligence in care. In this case, the dangerous character of the place where the rape occurred, is in dispute and various inferences are possible from the testimony offered. You must, therefore, decide whether

---

1. The interrogatory with the answer of the jury objected to reads as follows:

> 1. Was defendant Septa negligent? i.e., did Septa have knowledge of the dangerous condition of the subway platform at issue here and did it fail to adequately protect against such danger?
>
> Yes__x__ No____

it was, in fact, a place of hazard. If the surrounding circumstances and facts as they existed at that time and place are such that a reasonably prudent person would believe that the conditions manifested the characteristics of potential harm, then the place was dangerous in the eyes of the law. In determining whether this was a dangerous place and whether the defendant carrier was negligent in failing to perhaps provide proper security in its subway station, you must remember that there was no duty on the carrier to have anticipated the injury to the plaintiff unless defendants had been put on notice by previous occurrences that greater security was necessary."

The motion for a new trial will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOT THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 76-2580

CLARE IMMACULATA KENNY
v.
SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
and
CITY OF PHILADELPHIA

ORDER

The motion of the defendant Southeastern Pennsylvania Transportation Authority for Judgment N.O.V. is GRANTED.

The motion of the defendant Southeastern Pennsylvania Transportation Authority for a New Trial is DENIED.

It Is So Ordered.

Charles R. Weiner

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2489/90

CLARE IMMACULATA KENNY
v.
SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY
and
CITY OF PHILADELPHIA

Clare Immaculata Kenny,
Appellant in 77-2489
Southeastern Pennsylvania
Transportation Authority,
Appellant in 77-2490

Appeal From the United States District Court for the Eastern District of Pennsylvania.

(D.C. Civil No. 76-2580)

Argued June 5, 1978

Before: ADAMS, WEIS and GARTH, *Circuit Judges*.

OPINION OF THE COURT

(Filed July 18, 1978)

WEIS, *Circuit Judge.*

Whether a woman who is raped in the station of the Philadelphia transit system may recover damages from the carrier because of its lack of adequate protection is the issue in this diversity case. We conclude that a showing of deficient lighting on the station platform and insufficient attention to conditions by the only employee on the premises support a jury finding of carrier culpability. Accordingly, we reverse judgment n.o.v. in favor of the transit authority and reinstate the jury verdict.

The young woman plaintiff was awaiting the arrival of a train operated by SEPTA[1] when she was attacked by another patron. She filed suit in the district court charging negligence on the part of the transit authority and the City of Philadelphia. A jury awarded damages of $18,000 against SEPTA alone, but the district court entered judgment n.o.v.

The plaintiff's experience began on October 2, 1975, at about 9:00 P.M., when she purchased a ticket at the ground level cashier's booth at the Fairmount Avenue Station of the high speed Frankford Elevated Line in Philadelphia. She climbed three flights of steps to the elevated platform, sat on a bench near a light and waited for a northbound train. The only other person on the platform, a man on the opposite side of the tracks, crossed over to plain-

1. SEPTA, Southeastern Pennsylvania Transit Authority, is an entity created by the Pennsylvania legislature to provide mass transit in the Greater Philadelphia area. *See* Metropolitan Transportation Authorities Act of 1963, §§2, 4, PA. STAT. ANN. tit. 66, §§2002, 2003 (Cum. Supp. 1978-1979).

tiff's side and sat on the same bench. After saying a few words, the man dragged the plaintiff some 150 feet to the darkened south end of the platform and then beat and raped her. Her screams apparently alerted an unknown person in the neighborhood who called the police. Responding to a radio call, an officer apprehended the assailant on the platform.

The arresting officer and other policemen who investigated the crime testified that the area at the south end of the platform was dark and that the electric lights there were not lit. A detective who arrived about an hour after the attack occurred said it was necessary to use a powerful flashlight to illuminate the area in his search for physical evidence.

The SEPTA attendant who had been in the cashier's booth testified that he knew nothing of the attack and had not heard the plaintiff's screams. He admitted he had a portable radio playing in the booth, but said it was permitted by his employer. A telephone in the booth was connected with dispatchers and security units but was not used that evening until after police had come to investigate the incident. No other SEPTA employee was in the station or on the platform at the time the crime was committed.

A SEPTA employee testified that the transit system relied on Philadelphia police to provide protection for its patrons. He read a joint statement issued in 1972 by the Mayor of Philadelphia, the Board Chairman of SEPTA, and other public officials declaring that the occurrence of crime in the SEPTA transit system was intolerable. SEPTA had not taken any additional steps for passenger security after issuance of the joint statement, but as a measure to prevent crime, the city agreed in the statement to assign additional police to the SEPTA system. In 1973, Philadelphia received a grant from the federal government to hire 60 additional policemen after stating in its application that based on data compiled by SEPTA the "reported incidents on the high speed line are increasing, particu-

larly robbery, assault, and rowdism [*sic*]." At the trial, however, there was testimony that no criminal incidents had been reported at the Fairmount Station in the three years preceding the incident here.

Through its answers to interrogatories, the jury found that SEPTA had knowledge of the dangerous condition of the platform, failed to adequately protect against it, and this negligence was the proximate cause of plaintiff's injuries. The City of Philadelphia was exonerated.

The district court entered judgment n.o.v. in favor of SEPTA, finding it had no reason to anticipate the criminal conduct of the assailant at this particular station. The court also concluded that the lack of adequate lighting and a system of security devices, such as closed circuit TV coverage, telephones and warning devices, were not proximate causes of the assault upon plaintiff. In an alternative holding, the court denied the defendant's motion for a new trial based on contentions of an excessive verdict, improper admission of testimony on repairs to the lighting system following the attack, and prejudicial wording of the interrogatories.

I.

JUDGMENT N.O.V.

In this diversity case, we are guided by Pennsylvania law which does not hold the proprietor of a business establishment responsible for injuries to its patrons caused by criminal conduct of a third party unless the possibility or likelihood of criminal activity could reasonably have been foreseen or anticipated. In *Moran v. Valley Forge Drive-In Theater, Inc.*, 431 Pa. 432, 246 A.2d 875 (1968), a patron recovered from a theater for injuries received when rowdy teenagers exploded a firecracker near him. The record revealed previous instances in which firecrackers had been exploded on the premises and the proprietor had taken no

steps to warn its customers or curb unruly behavior of youthful visitors. The Pennsylvania Supreme Court cited with approval §344 of the RESTATEMENT (SECOND) OF TORTS (1965) which reads:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
> (a) discover that such acts are being done or are likely to be done, or
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment *e* notes "it may not be enough for the servants of the public utility to give a warning, which might be sufficient if it were merely a possessor holding its land open to the public for its private business purposes." A utility may be required to take additional steps to control the conduct of third persons or otherwise protect the patron against it.

Where the possessor of land may have reason to know that there is a likelihood of conduct on the part of third persons generally which is apt to endanger the safety of patrons, the owner may be under a duty to take precautions against such conduct. The focus of inquiry is not limited to anticipation of criminal conduct by the person who actually caused the harm. The trial court in this case narrowed the ambit of liability by looking to the expectations of SEPTA as they applied to the specific offender at the specific location. The duty to protect its patrons, however, is not determined by whether SEPTA had reasonable ground to expect violence directed toward the plaintiff by the particular assailant, but whether the Authority could reason-

ably have expected criminal activity from anyone at its station. *See Morgan v. Bucks Associates*, 428 F. Supp. 546 (E.D. Pa. 1977); *Ford v. Jeffries*, — Pa. —, 379 A.2d 111 (1977); *Anderson v. Bushong Pontiac Co.*, 404 Pa. 382, 171 A.2d 771 (1961).

The record reveals that crime on SEPTA's high speed lines, as well as its other systems, had been on the rise. Although steps had been taken to increase police protection, we cannot say as a matter of law that this was enough to preclude SEPTA's liability. As comment *d* to §344 indicates, a utility is required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons may endanger the safety of patrons.

The presence of adequate lighting is recognized as a discouragement to violent criminal activity, particularly in an area where members of the public may be expected.[2] Traditionally, adequate street lighting has been advocated as an effective means of reducing crimes against the person, such as robbery, assault, and rape. SEPTA recognized the value of adequate lighting. In response to an interrogatory inquiring what "security measures are currently in effect," it answered that, in addition to police department measures, "[d]efendant's stations were well-lighted." Indeed, there were light standards placed at adequate intervals along the platform at the Fairmount station. But having the fixtures in place is not enough. They must be in condition to perform their function, that is, illuminate the area. In this respect, there was a jury question as to whether SEPTA had properly maintained the equipment which it had installed.

The plaintiff's testimony, corroborated by the police, was that there was no light in the area where the attack

2. *See e.g.*, Picco v. Ford Diner, Inc., 113 N.J. Super. 465, 274 A.2d 301 (1971); Atamian v. Supermarkets General Corp., 146 N.J. Super. 149, 369 A.2d 38 (1976).

occurred, even though fixtures were there. There was evidence that the light bulbs were missing and that the fixtures were rusted, indicating they had not held bulbs for some time. The jury was entitled to determine that insufficient maintenance by SEPTA was negligence, particularly in view of its knowledge that crime had been increasing in the transit system. If further evidence of the connection between criminal activity and lack of lighting were needed, the fact that the assailant dragged the plaintiff to a darkened area supplied it. Whether inadequate, indeed nonexistent, lighting was a substantial factor in bringing about harm to the plaintiff was a matter for the jury to resolve. *See Ford v. Jeffries, supra.*

Nor was this the only way in which the jury could have found SEPTA failed to protect the plaintiff. The Authority had one employee on the premises. Perhaps it might not have been feasible to place the cashier's booth where he could observe conditions on the platform or to utilize the area on the ground floor near the ticket booth as a waiting room during the evening hours when the platform would be deserted. Nevertheless, for the company to permit the cashier, the sole employee of the Authority at the station, to play a radio while on duty and thus impair his hearing ability was to reduce the effectiveness of his presence. The location of the ticket booth prevented him from seeing any disturbance on the platform and the radio prevented him from hearing anything. Had the cashier heard the screams, he could have quickly gone to the platform, as well as called for police assistance immediately. Plaintiff's cries were loud enough to be heard by someone in the neighborhood who called the police. The jury might well have found that SEPTA owed the plaintiff at least as much concern. *See La Sota v. Philadelphia Transportation Co.*, 421 Pa. 386, 219 A.2d 296 (1966).

II.

SEPTA's Motion for a New Trial

SEPTA has filed a cross appeal from the district court's dismissal of its motion for a new trial. Among the grounds asserted is that the trial court erred in allowing testimony that new lighting had been installed on the platform a few days after the attack. A SEPTA employee testified that lighting at the stations was checked on a daily basis. He produced records showing that about an hour after the rape one light bulb was replaced at a crossover between the two tracks, and the following night, three bulbs were installed. On the day before the incident, four bulbs had been replaced on the southbound platform.

On cross-examination, plaintiff's counsel elicited the fact that a new fluorescent fixture was installed four days after the attack. Defendant contends that this evidence of subsequent repairs was prejudicial. The trial judge, however, ruled that the testimony was admissible for impeachment purposes and also to show the feasibility of precautions. We conclude that the evidence was admissible.

As a general rule, evidence of remedial measures taken after the event is not admissible to prove culpable conduct. Fed. R. Evid. 407.[3] The reason for the exclusion is to encourage post-accident repairs or safety precautions in the

3. Rule 407 states:

> Subsequent Remedial Measures
>
> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

interest of public safety. *See* Saltzburg & Redden, Federal Rules of Evidence Manual 162 (2d ed. 1977). But when the defendant opens up the issue by claiming that all reasonable care was being exercised at the time, then the plaintiff may attack that contention by showing later repairs which are inconsistent with it. *See* 2 J. Weinstein & N. Berger, Weinstein's Evidence ¶¶407[03], [04] (1977).

In this case, the evidence did not show that a protective device of a nature not previously utilized was subsequently installed, but rather established the need for replacement of that which had previously been employed. As such, the testimony bore directly on the inference that since the lighting was checked on a daily basis, it was adequate at the time the incident occurred. The installation of a new fixture suggested that more than new light bulbs were necessary to maintain the level of lighting that apparently had once existed at the station. Moreover, the cross-examination tended to cast doubt on the thoroughness of the inspections made by the defendant. Hence, the evidence was admissible.

Defendant also argues that the interrogatory submitted to the jury was unduly suggestive of SEPTA's liability. The interrogatory read:

> Was defendant SEPTA negligent? i.e., did SEPTA have knowledge of the dangerous condition of the subway platform at issue here and did it fail to adequately protect against such danger?

While the wording of the interrogatory might well have been more neutral in tone, in this case and on this record we do not find its submission to the jury constituted reversible error. The trial court in its charge clearly instructed the jury to "decide whether it was, in fact, a place of hazard" and twice said that the jury had to be satisfied by a preponderance of the evidence that SEPTA knew "the place where plaintiff was injured was a dangerous one." Moreover, similar language was used in the inter-

rogatory directed toward the potential liability of the city; yet, the jury exonerated it. We do not believe, therefore, that the jury was misled as to matters which it had to decide.

Defendant also contends that the verdict was excessive. The trial judge stated that his conscience was not shocked by the amount of the verdict, nor did he believe it was based on prejudice or passion. In considering the agonizing experience which the plaintiff had undergone, her humiliation, mental anguish and emotional distress, we cannot say that the trial court abused its discretion in not ordering a new trial.

Accordingly, the judgment in favor of the defendant in appeal No. 77-2489 will be vacated. In appeal No. 77-2490, the order denying defendant's motion will be affirmed. The verdict in favor of the plaintiff will be reinstated and judgment entered in her favor.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2489/77-2490

CLARE IMMACULATA KENNY,
Appellant in No. 77-2489
v.
SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Appellant in No. 77-2490
and
CITY OF PHILADELPHIA

(D. C. Civil No. 76-2580)

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: ADAMS, WEIS and GARTH, *Circuit Judges*.

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 5, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 26, 1977, be, and the same is hereby vacated with respect to the judgment in favor of defendant in appeal No. 77-2489 and affirmed with respect to the order denying defendant's motion in appeal No.

77-2490. The verdict and judgment in favor of plaintiff, entered June 3, 1977, and June 6, 1977, are reinstated. all in accordance with the opinion of this Court. Costs taxed in favor of plaintiff.

ATTEST:

M. ELIZABETH FERGUSON
Acting Clerk

Costs taxed in favor of appellant, Clare Immaculata Kenny, as follows:

Brief	$ 147.02
½ Joint Appendix	1,052.64
Reply Brief	135.68
Clerk's Fees	50.00
TOTAL	$1,385.34

August 15, 1978

Certified as a true copy and issued in lieu
of a formal mandate on September 6, 1978

Test: M. ELIZABETH FERGUSON

Acting Clerk, U.S. Court of Appeals
for the Third Circuit